U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: DEC 2 6 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The petition is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an information technology company. It seeks to permanently employ the beneficiary in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on July 10, 2007.

The petition was accompanied by a copy of an Application for Alien Employment Certification, Form ETA 750, which was filed with the U.S. Department of Labor (DOL) on behalf of the alien [redacted] on November 7, 2002, and was certified by the DOL on behalf of [redacted] on March 5, 2007. Supplementing the copied Form ETA 750 were two additional pages of an original Form ETA 750 which were signed by [redacted] dated June 21, 2006, and listed [redacted] educational degrees and work experience. In addition, the petitioner submitted a letter from counsel, dated July 13, 2007, requesting that [redacted] be substituted for [redacted] as the beneficiary in this proceeding. The substitution of beneficiaries was permitted at that time by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications, but it was not effective until July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predated the final rule, and since another beneficiary had not been issued lawful permanent residence based on the labor certification, the requested substitution was permissible.[1]

The labor certification sets forth the educational and experience requirements for the proffered position. As specified in Part A, boxes 14 and 15, of the Form ETA 750, the requirements for the job in this case are:

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[1] The petition was initially denied by the Director on August 26, 2008, on the ground that the labor certification underlying the instant petition had already been used by the original beneficiary to acquire permanent resident status in the United States on July 27, 2005. The petitioner filed a motion to reopen and reconsider, which was approved by the Director on September 10, 2009. Finding that the petitioner had overcome the ground for denial, the Director rescinded his decision of August 26, 2008, and ordered that the petition be readjudicated.

- Education:

  A master's degree in engineering, mathematics, computer science, or MIS (management information systems).

  With respect to the master's degree requirement, the labor certification specified that the employer "will also consider Bachelor's Degree in the mentioned field of studies with five years of progressive experience in the job offered."

- Experience:

  2 years in the job offered or in a related occupation such as programmer analyst or systems analyst.

As evidence that the substitute beneficiary met the educational and experience requirements specified on the labor certification, the following documentation was submitted, in photocopied form, with the petition:

- The beneficiary's diplomas and transcripts showing that he received (1) a Bachelor of Engineering in Computer Science from [redacted] University in India on January 16, 1998, after completion of a four-year course of study in the years 1994-1997,[2] and (2) a Master of Science with a major in Computer Science from Long Island University (LIU) in New York on January 16, 2004, after completing a course of study comprising five semesters and two summer sessions from the fall of 2001 through the fall of 2003.

- Letters from former employers who stated that the beneficiary worked for (1) [redacted] as an intern/junior programmer from January 1996 to March 1997; (2) [redacted], as a software engineer/programmer analyst from July 1997 to June 2001; (3) [redacted] in North Liberty, Iowa, as a software engineer from March 2004 to September 2004; (4) [redacted], as a software engineer from October 2004 to March 2005; and (5) [redacted] (the petitioner) in Whitehouse Station, New Jersey, as a software engineer/programmer analyst from April 2005 until June 18, 2007 (the date of the letter).[3]

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[2] According to the Electronic Database for Global Education (EDGE), created by the American Association of College Registrars and Admissions Officers (AACRAO), a bachelor of engineering degree in India is awarded after four years of postsecondary study and is comparable to a bachelor's degree in the United States.

[3] The letters appear to meet the substantive requirements of 8 C.F.R. § 204.5(g)(1), including the name, address, and title of each writer, and a specific description of the duties performed by the beneficiary in each job.

On September 24, 2009, the Director issued a Request for Evidence (RFE) on the issues of whether the beneficiary had the requisite education and experience to meet the job requirements of the labor certification, as well as the petitioner's ability to pay the proffered wage in all pertinent years. The petitioner responded to the RFE on October 26, 2009, with a brief from counsel and additional documentation. In his brief counsel claimed that the petitioner's former counsel had erroneously filed the Form I-140 seeking employment-based second preference (EB-2) classification for the beneficiary. Counsel stated that the petitioner wished to change the designated classification of the petition to employment-based third preference (EB-3).

On November 25, 2009, the Director issued a decision denying the petition. With regard to the requested change of the petition's classification from EB-2 to EB-3, the Director held that a petitioner may not make material changes to a petition in an attempt to make the petition conform to agency requirements, citing *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998). The Director found nothing in the original record which indicated that the petitioner intended to file the instant petition under section 203(b)(3)(A)(i) or (ii) of the Act, rather than section 203(b)(2) of the Act. The Director also determined that the beneficiary did not meet the educational and experience requirements of the labor certification as of the priority date (November 7, 2002 – the date the Form ETA 750 was accepted for processing by the DOL). With respect to education, the Director noted that the beneficiary did not receive his master's degree in computer science until January 2004, which was more than a year after the priority date. Thus, the beneficiary could not meet the educational requirement of the labor certification based on his master's degree. While finding that the beneficiary did have a bachelor of engineering degree and more than five years of qualifying work experience by the priority date of November 7, 2002 (which would meet the definition of an "advanced degree" under the regulations),[4] the Director determined that the beneficiary did not have all of the experience mandated by the labor certification because he did not satisfy the separate and additional requirement of two years of experience in the job offered or a related occupation by the priority date. The Director found that the beneficiary had five years and three months of qualifying work experience before the priority date, which was one year and nine months short of the total amount required to meet both the educational and experience requirements of the labor certification. The Director rejected the petitioner's claim that work experience used in conjunction with a bachelor's degree to meet the educational requirement of the labor certification may simultaneously be used to satisfy a separate work experience requirement on the labor certification.

The petitioner filed an appeal, Form I-290B, on December 28, 2009, which was followed by a brief from counsel and additional documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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[4] The Director's calculation was incorrect. For one thing, he chose July 1997 as the starting point of the beneficiary's post-baccalaureate experience because the Bachelor of Engineering degree states that the beneficiary completed his examination(s) that month. However, the degree was not conferred until January 16, 1998, and that is the proper starting date for the calculation of post-baccalaureate experience. Furthermore, the Director inexplicably counted 15 months of experience from January 1996 through March 1997 – a period that preceded the award of the beneficiary's Bachelor of Engineering degree (even if measured from the Director's incorrect starting point of July 1997).

As framed by counsel, the issues on appeal are:

- Whether the Director erred by reading the certified Form ETA 750 to require a bachelor's degree and seven years of experience.

- Whether the Director erred by refusing to allow the I-140 petition to be considered under the employment-based third preference category.

Did the beneficiary meet the educational and experience requirements of the labor certification?

The petitioner must demonstrate that the beneficiary possessed all the education, training, experience, and any other requirements specified on the labor certification as of the priority date, which is the date the labor certification application was received for processing by the DOL. *See Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The key to determining the job qualifications in the Form ETA750 is in Part A – "Offer of Employment" – in particular Box 14, which specifies the minimum education, training, and experience requirements for the job, and Box 15, in which other special requirements may be indicated. It is important that the document be read as a whole. The instructions for the Form ETA 750, item 14, read as follows:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

For the proffered position in this case, Part A of the labor certification states the following minimum requirements:

Block 14:	Education:	College Degree – Master's * Major Field of Study – Engineering, Mathematics, Computer Science, MIS
	Training:	None
	Experience:	2 years in the Job Offered or 2 years in a Related Occupation such as Programmer Analyst or Systems Analyst.
Block 15:	Other Special Requirements:	

* Will also consider Bachelor's Degree in the mentioned field of Studies with five years of progressive experience in the job offered.

When determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

According to counsel, the Form ETA 750 should be read as requiring either a master's degree plus two years of experience or a bachelor's degree plus five years of experience. It was not the petitioner's intent, counsel asserts, to specify an alternate combination of education and experience consisting of a bachelor's degree and seven years of experience.

To better ascertain the petitioner's intent at the time it completed the Form ETA 750, the AAO issued a Notice of Intent to Dismiss (NOID) on October 31, 2012, affording the petitioner 30 days to submit copies of the documents submitted to the DOL during the labor certification process. The AAO also pointed out that the time period between the award of the beneficiary's Bachelor of Engineering degree (January 16, 1998) and the filing of the petitioner's labor certification with the DOL (November 7, 2002) was a little under four years and ten months. Thus, it did not appear that the beneficiary could have gained a full five years of post-baccalaureate experience in the job offered by the priority date of November 7, 2002, as required for the bachelor's degree and experience to "be considered the equivalent of a master's degree" under 8 C.F.R. § 204.5(k)(2).

On November 30, 2012, the petitioner responded to the NOID with a brief from counsel and an affidavit from the petitioner's president. Counsel's brief was supplemented with a further submission on December 10, 2012. In his affidavit, dated November 28, 2012, the petitioner's president states that the documentation from the labor certification process was no longer in the company's possession, but that the petitioner did not intend to require a bachelor's degree and seven years of experience to qualify for the proffered position. Counsel echoes this claim, asserting that the petitioner's intention on the labor certification application was to require either a master's degree and two years of experience or a bachelor's degree and five years of experience – not a bachelor's degree and seven years of experience. Counsel asserts that it is unreasonable to expect the petitioner to still have the documentation from the labor certification application that was filed ten years ago (and certified more than five years ago), pointing out that current regulations only require that labor certification applications and supporting documentation be retained by the employer for five years after the application was filed. *See* 20 C.F.R. § 656(10)(f). Absent any materials from the labor certification process, the AAO will adjudicate this appeal based on the evidence in the record.

As previously stated, the beneficiary's Master of Science degree from LIU in New York was awarded on January 16, 2004. Since this degree came more than 14 months after the priority date of the

instant petition – November 7, 2002 – it does not qualify the beneficiary for the proffered position under the terms of the labor certification (which also requires two years of qualifying experience). *See Matter of Wing's Tea House, supra*. The beneficiary's Bachelor of Engineering degree from [redacted] University in India was awarded on January 16, 1998. This date was less than five years before the priority date of November 7, 2002. Thus, even if the beneficiary had post-baccalaureate work experience throughout that time period, it would not reach the requisite five years for his bachelor's degree and experience to "be considered the equivalent of a master's degree" under 8 C.F.R. § 204.5(k)(2). As it is, the beneficiary fell far short of the five year minimum. The only experience the beneficiary acquired during the requisite time period was with Indosoftech in Hyderabad, India, where he worked as a software engineer from July 1997 to June 2001. Calculated from the bachelor's degree date of January 16, 1998, the beneficiary had three years and five months of qualifying experience up to June 2001, when he left the company. After that the beneficiary began his master's degree studies at LIU and did not acquire any further post-baccalaureate experience before November 7, 2002.

Thus, the beneficiary did not have either a master's degree and two years of experience or a bachelor's degree and five years of post-baccalaureate experience before the priority date. Therefore, he does not qualify for the job offered under the terms of the labor certification even if the alternative combination of education and experience is interpreted as requiring only five years of post-baccalaureate experience. Nor is he eligible for classification as an advanced degree professional because he did not have an "advanced degree" as defined in 8 C.F.R. § 204.5(k)(2). Accordingly, the petition cannot be approved.

Since the beneficiary did not have five years of post-baccalaureate experience before the priority date, the AAO need not address the issue of whether the Form ETA 750 should be interpreted as requiring seven years of experience or five following his bachelor's degree.

Should the petition be considered under the category of professional or skilled worker?

Counsel reiterates its claim that the petition should be considered under the employment-based third preference category (classification as a professional or skilled worker) because the Form ETA 750 was not properly drafted by prior counsel to support a second preference classification. According to counsel, the Director's citation of *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1988), holding that "[a] petitioner may not make material changes to his petition in an effort to make a deficient petition conform to [USCIS] requirements," was misplaced. The AAO does not agree. The petitioner's attempt to change the classification category on its Form I-140 petition from an advanced degree professional to a professional or skilled worker is exactly the sort of material change that *Matter of Izummi* addresses. Furthermore, even if USCIS adjudicated the petition as an employment-based third preference petition, it would have been denied because the beneficiary does not meet the clear terms of the labor certification. *See Matter of Wing's Tea House*. The beneficiary had not earned a master's degree by the priority date, and the Form ETA 750 requires "five years of progressive experience in the job offered" in addition to a bachelor's degree as an alternate combination of education and experience. Therefore, the terms of the labor certification, regardless of the Form I-140 classification being sought, require five years of progressive experience in the job offered. As explained above, the beneficiary does not meet this requirement.

Conclusion

The petition cannot be approved because the beneficiary did not have the requisite combination of education and experience as of the priority date to qualify for the job offered and for classification as an advanced degree professional under section 203(b)(2) of the Act.

There is no basis in the record for the petition, which was clearly designated on the Form I-140 as being filed for an advanced degree professional (second preference category), to be considered under the third preference category to classify the beneficiary as a professional or a skilled worker. Even if it had been so considered, the petition would have been denied because the beneficiary does not meet the terms of the Form ETA 750.

As always in visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.